TOWN OF WELLESLEY MASSACHUSETTS 76-51

BOARD OF APPEAL

KATHARINE E. TOY
Administrative Secretary
Telephone
235-1664

Petition of Gerald Venable

Pursuant to due notice the Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:35 p.m. on August 5, 1976, on the petition of W. Gerald Venable, requesting a variance from the terms of Section II and Section XVIII of the Zoning By-law, which would allow the land and the building, now owned by The New England Conservatory of Music, and located at 169 Grove Street to be used as an eleven unit apartment building within a Single residence District and to allow less than 10,000 square feet per dwelling unit as required by the Zoning By-law. Said request was made pursuant to the provisions of Chapter 40A, Section 15, of the General Laws.

On July 16, 1976, the petitioner filed his request for a hearing before this Board, and thereafter due notice of the hearing was given by mailing and publication.

W. Gerald Venable, architect and proposed buyer of the property involved, explained in detail the proposed plans and the extent of renovation proposed to the interior and exterior of the building, as well as other developments of the site.

Andrew Falender, representative of New England Conservatory of Music, explained that in 1965, the Conservatory of Music purchased the property involved and used it as a school until May of last year when its directors decided to sell the property. This became necessary, he stated, due to the reduced enrollment in the school and the rapid rise in the cost of operation. Since then the property has been for sale, but neither the owner or the real estate broker have had any interested buyers for the property to be used as a single-family dwelling or a school. It is a large house with twenty rooms and no kitchen and not conducive for single-family dwelling; also there is little demand for it to be used as a school facility because of the substantial renovation cost which would be required to make the property conform to building code requirements as an educational facility. For these reasons, it is felt that financial hardship will result unless a variance can be granted for the proposed use of the property.

Hrant H. Russian, attorney for the petitioner, stated that for fifty-two years the property has not been used as a single-family dwelling, but as uses incidental to Dana Hall School and more recently by the New England Conservatory of Music. It was stated that although the lot in question contains 71,983 square feet, due to the large easement for the Sudbury Aqueduct, the remaining useable square footage is 45,483 square feet. The property is further subject to a driveway easement for the use of the Quaker Meeting house on a rear lot, and an easement for the Sudbury Acqueduct.

It was further stated that substantial hardship will result to the petitioner, it is felt, if the requested use is not granted. The Board's attention was directed to two Supreme Judicial Court decisions, which it is felt have a direct bearing on the issues involved because of the unique structure

already present on the lot, and the two easements mentioned above.

The Supreme Judicial Court, Dion V. Board of Appeal of Waltham, 344 Mass. 547 (1962) and Johnson V. Board of Appeal of Wareham, 360 Mass., 872, 277 N. E. 2d 695 (1972). Copies of these cases were submitted. It is felt that there would seem to be similar circumstances present in the case involved. The unique building and the isolating easements create a special hardship peculiar to this lot. The area contains a church building, a school complex, and the Charles River Hospital complex. Since the present structure has been used as a school, it is felt, that there would be no additional traffic problems presented, and no substantial detriment to the area if the proposed conversion is allowed. Under the circumstances, it is believed, a multiple family dwelling would be in keeping with the residential nature of the area and present no substantial derogation of the intent or purpose of the By-law.

The following persons spoke in favor of the request at the hearing: O. E. Smith, 2 Ingraham Road, Elizabeth C. Conway, 37 Longmeadow Road, Nancy W. Sears, 5 Waban Street, Jane Batista, 5 Woodridge Road, Catherine E. Dresser, 6 Benvenue Street, and Frederic G. Corneel, representing the, "Friends" abutting property owners to the west of the property involved. All felt that the proposed use of the property was reasonable and the best way to control the change which they felt to be inevitable. They also felt that it is increasingly difficult for older people to find suitable places to live and felt it would be too bad if they were forced to leave Wellesley.

Mr. Corneel stated that at the Wellesley Monthly Meeting of the Friends, it was decided that it would not be appropriate to express any view with respect to the effect of the project on the character and future of the neighborhood property values, but limited its consideration to the effect of the proposed project on the conduct of the Friends' activities. The most important consideration, it was stated, is that the Meeting for Worship is a silent meeting, and therefore are concerned with noise and traffic in the immediate vicinity. However, it was felt that other uses would certainly be less desirable, and therefore, they would support the proposal based upon the representation made by Mr. Venable with respect to the following items which they requested that the Board of Appeal incorporate in its order should it grant the requested variance.

1. The only changes in the exterior will be the addition of fire escape on the south side of the building and the addition of an entrance to the ground-floor apartment on the west side of the building.

2. There will be no more than ten apartments plus one caretaker's unit in the basement.

3. To the extent enforcement of this limit is permitted by law, not more than two people will be allowed to live on a permanent basis in each apartment. All tenancies will be for a period of not less than a year. (see letter of 9/25/76)

4. An effort will be made to provide attractive landscaping--Mr. Venable indicated that this was still somewhat in the planning stage, and that none of the trees now on the property will be removed.

William H. Frederickson, 37 Jackson Road, stated that if the request is granted, it will establish a precedent for other older type houses in the neighborhood, and recommended that this should be brought up to Town Meeting.

The following persons spoke in opposition to the request: Ellen M. Staelin, 14 Tappan Road,/260 Grove Street, Harold F. Barnard, 302 Grove Street, Barbara H. Whitcomb

Richard O. Aldrich, 26 Lathrop Road, William M. Dubbs, 82-84 Dover Road, Ruth Anne Newayser, 25 Ingraham Road, Charles W. Chamberlain, Jr., 14 Benvenue Street, John T. Vinton, 15 Ingraham Road and Lena Jung, 21 Benvenue Street. All felt that the proposed use of the property would create additional traffic problems, that ten apartments plus a caretaker's apartment would be a much too intensive use for the area, and if allowed, the neighborhood will be surrounded by multiple-family houses within a short time.

A petition signed by 83 persons opposing the request was submitted by Ruth Anne Newayser.

Letters opposing the request were received from: Beatrice H. Tulino, 29 Benvenue Street, Barbara H. Whitcomb and Isabelle W. Holman, 260 Grove Street, and Susan M. Chamberlain, 14 Benvenue Street.

The Planning Board in its report opposed the granting of the variance to allow the property to be used as an eleven unit apartment building. However, it recommended that if a variance is warranted by the facts, certain restrictions and limitations be imposed as stated in its report.

Statement of Facts

The property involved which contains 71,983 square feet in its entirety contains only 45,483 square feet of useable space due to a large easement for the Sudbury Aqueduct. It is located within a Single-residence District requiring a minimum lot area of 10,000 sq.ft.for house development. There is an existing building on the property which is approximately seventy-five years old.

The petitioner seeks permission to convert the building into ten apartments, consisting of one studio and four one-bedroom dwelling units on the first floor, three one-bedroom dwelling units on the second floor, and two one-bedroom dwelling units on the third floor, plus the caretaker's dwelling unit located in the basement. With the exception of one new fire escape located on the south side and one new entrance located on the west side, the exterior condition of the existing building would remain as it is. The petitioner has stated that the proposed renovations to the interior and exterior of the building will be compatible with the character and appearance of the best portions of the existing building and will be of the highest quality workmanship.

The property was owned and used by Dana Hall School as a dormitory and classroom building until 1965 when it was sold to the New England Conservatory of Music. As stated by the petitioner's attorney, the property was placed on the market for sale in the Spring of 1975, when it was found that due to reduced enrollment and the rapid rise in operating cost of the facility, the school could not continue financially. During the past year, it was stated, that there have been no offers to purchase the property for either a single family dwelling or as a school.

The building contains twenty rooms plus a large auditorium and stage, six and one-half baths, numerous halls and a full basement. It was argued by the petitioner's attorney that the large number of rooms and the auditorium and stage make the property unique to a single-family residence district and unsuitable as a single-family residence. For that reason and the fact that the Aqueduct easement isolates the structure from Benvenue and Grove Streets and the driveway easement isolates the structure from the residences fronting on Ingraham Road, the petitioner feels that the criteria required by the Board to find under Chapter 40A, Section 15, of the General Laws are met. In his opinion a substantial hardship will result if relief is not granted and that the proposed use of the property will not be a substantial detriment to the public

good, nor will it derogate from the intent or purpose of the Zoning By-law.

A plot plan was submitted, drawn by Everett M. Brooks Co., Civil Engineers, dated July 9, 1976, which showed the location of the building on the property as well as parking spaces for 17 automobiles to be provided.

Decision

The Board denies the requested variance and the petition is dismissed.

Under General Laws, Chapter 40A, Section 15, Clause 3 there are four prerequisites that must be satisfied before a Board of Appeal may grant a variance. They are (paraphrased) as follows:

> First, there must be conditions especially affecting the parcel or building but not affecting generally the Zoning district in which it is located.
>
> Second, because of these conditions, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise.
>
> Third, desirable relief may be granted without substantial detriment to the public good.
>
> Fourth, such relief may be granted without nullifying or substantially derogating from the intent or purpose of such ordinance or bylaw.

As to these four prerequisites, "a failure to establish any one of them is fatal"; Blackman vs. Board of Appeal of Barnstable 334 Mass. 446, 450 (1956).

We do find hardship.

We do find conditions especially affecting the parcel or building which do not affect generally the zoning district.

We do find that desirable relief may be granted without substantial detriment to the public good.

We do not find that such relief may be granted without nullifying or substantially derogating from the intent or purpose of the Zoning By-law.

The petitioner's proposed use of the premises for an eleven unit apartment building is a use substantially more intensive than that (single family residence) for which the district is now zoned. The requested variance is not in the nature of a request for converting a single family house into a two-family house, or enclosing a pre-existing open porch or adding a dormer to the roof of a house on a lot non-conforming as to area.

In the case of Cary vs. Board of Appeals of Worcester, 340 Mass. 748 (1960), the petitioner owned a market in a business district and sought to use an interior lot located in an adjacent residential district for a parking lot for employees and customers. The proposed parking lot land was bounded on two sides by five residential lots, on one side by the then existing parking lot of the petitioner's market, and on the fourth side by a school grounds.

The Court noted the trial judge's findings that the enlarged parking lot might enhance the public good by lessening on-street parking; however, the Court went on to state, "The test of the statute is general; the effect of a variance on the intent or purpose of the ordinance must be determined by appraising the effect on the entire neighborhood affected." The Court continued, "The balancing of public advantage against the hurt to individuals which is inevitable with zoning is appropriately done in connection with the enactment or amendment of the ordinances or by-laws".

The Court then reversed the decree of the Superior Court which had upheld the granting of the variance.

This Board finds that the Cary case is most persuasive in light of the facts of the present case.

Our petitioner's property is located on the opposite side of a public street from a school. It is a few hundred yards from a small, private hospital. However, it abuts six single family house lots.

In the Cary case, the Court also stated the issue as "whether, despite the probable lessening of traffic congestion on (the adjacent street), the substantial injury to the several abutting parcels of land constitutes substantial derogation from the intent or purpose of the ordinance". The Court found that it did so derogate.

In the present case, the Board finds such derogation because of likely substantial injury.

The likely substantial injury is found by the Board through its own view of the premises and through the testimony of persons present at the hearing.

As for the Board's own findings, it finds that the petitioner's property is located well within a residential district at the common boundary point of 10,000, 20,000, and 40,000 square foot lot districts. While there are a school and a hospital nearby, the Board does not find that such nearby uses are noisy or otherwise objectionable. Indeed, their land use provides open space. In other words, it is not as if the use of petitioner's property as an apartment building would pass unnoticed because of distractions created by other nearby institutional uses.

Certain witnesses at the hearing testified that the property was no longer economically viable and that, without a variance to permit the present proposed (and, presumably viable) use, the property might fall into some even more objectionable use. However, the Board may not conjecture about the future, but must at this time compare the difference in effects between a use of the property presently authorized by the zoning by-law and the use proposed by the petitioner.

In the case of DiRico vs. Board of Appeals of Quincy, 341 Mass. 607 (1961), petitioner sought to convert a "conspicuously unsightly" factory into a professional office building. The Court agreed with the trial judge that a remodeled office building would be more attractive than the then present neglected factory building. However, the Court found that the land was well adapted for the construction of a residence or residences for which it was zoned and held that the proposed variance could not be granted. The Board likewise finds the property presently in question could be used for a residence or residences, albeit perhaps not for more than two.

The Board's other resource for determining the question of substantial injury to nearby properties is the testimony of the owners of such properties. There were witnesses in favor and witnesses opposed. Testimony was given in a thoughtful and courteous manner. The majority of nearby owners, who would be most affected by the granting of the variance, testified that, if the variance were granted, harm would result to their properties and to the neighborhood.

While it may be said that this majority is not comprised of real estate or land damage experts and that their perceptions of injury to their properties may be mistaken, we feel that the Board is not remiss in giving credence to the majority's collective opinion.

Finally, we note the Supreme Judicial Court's statement in the Blackman case, cited above, namely, "This Court has said repeatedly that the power to vary the application of a zoning ordinance must be 'sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature, and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others'", (Emphasis supplied).

We note in passing that the petitioner's case was ably presented by his counsel and other representatives. With respect to the Dion and Johnson cases cited by petitioner's counsel and referred to above, the Board distinguishes them from the present case as follows:

In Dion the subject premises was in Waltham on a corner of Trapelo Road and another street and was situated about 800 feet from Route 128. The The issues in that case were primarily procedural. The most serious objection to the trial judge's conclusion made by the appealing party was the question of special hardship affecting the locus, a point which this Board concedes. The Court added (p. 555), "Variances are to be granted sparingly and granting them has been surrounded by many statutory safeguards."

In the Johnson case petitioner sought to convert the building that formerly housed a church into office suites. The case can be distinguished, however, from the present case. In Johnson, the church was located in Wareham on Route 6, a major traffic artery. The land opposite was zoned commercially and contained a warehouse and a business concern. In that case, a board of appeal could reasonably conclude that the sought for variance could be granted without substantial derogation from the intent and purpose of the by-law.

The members of the Board sitting for this hearing were F. Lester Fraser, William O. Hewett, and Henry H. Thayer, all of whom voted in accordance with this decision.

Henry H. Thayer

F. Lester Fraser

William O. Hewett

Filed with Town Clerk 10/15/76

PLOT PLAN OF LAND
IN
WELLESLEY o MASS.

SCALE: 1 IN. = 40 FT. JULY 9, 1976

EVERETT M. BROOKS CO. CIVIL ENG'RS.
NEWTONVILLE MASS.

NOTE: 17 TOTAL PARKING SPACES
TYPICAL SIZE
PARKING SPACE 8½' x 18'

COMMONWEALTH OF MASSACHUSETTS
CHARLES D. THOMPSON
No. 14675
REGISTERED LAND SURVEYOR

Charles D. Thompson